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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Implementation of Sections 11
and 13 of the Cable Television
Consumer Protection and Competition
Act of 1992

Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations
and Anti-trafficking Provisions

MM Docket 92-264

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**PETITION OF BELL ATLANTIC
FOR LIMITED RECONSIDERATION¹**

The Commission's order in this proceeding holds that its vertical and horizontal ownership limits for cable will apply to systems that face effective competition as well as those that do not.² Under the 1992 Act, however, the purpose for imposing ownership limits is to promote competition for cable.³ Ironically, applying these limits to competitive systems will actually prevent the introduction of such systems, and in this respect the ownership rules will help to perpetuate the problem they are meant to solve. Consequently, the Commission should

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac telephone companies, The Diamond State Telephone Company, and New Jersey Bell Telephone Company.

² Horizontal and Vertical Ownership Limits, etc., MM Dkt 92-264, Second Report and Order, ¶¶ 29, 88-89 (rel. Oct. 22, 1993).

³ See 47 U.S.C. § 533(f)(1).

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reconsider its order and exclude competitive systems from its ownership limits.

Although Congress found in the 1992 Act that cable operators possess "undue market power ... compared to that of consumers and video programmers," it recognized that this is true only for operators that do not face competition in their local franchise areas.⁴ Congress, therefore, directed the Commission to establish rules for regulating cable rates in areas where local competition is absent, but recognized that such regulation is unnecessary where local competition exists.⁵ Under these circumstances, competition itself eliminates the ability to exercise market power, and regulatory constraints serve only to hinder the flexibility of competitors in responding to the demands of the marketplace.

The same underlying principles also apply here.⁶ The purpose behind Congress's directive to establish reasonable ownership limits for cable was to promote competition and to prevent cable operators from exercising market power.⁷ But in

⁴ Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(2).

⁵ 47 U.S.C. § 543(a)(2).

⁶ See 47 U.S.C. § 533(f)(2) (directing the Commission to "take particular account of the market structure ... including the nature and market power of the local franchise").

⁷ See supra note 3; see also S. Rep. No. 92, 102d Cong., 1st Sess. 24, 32 (1991) ("Senate Report").

those local markets where competition is present, these goals will have already been achieved and applying the limits will actually undermine Congress's objective. This is true for both the vertical and horizontal limits.

First, vertical ownership limits should not apply to competitive systems. While Congress was apparently concerned that cable operators might block independent programmers from reaching consumers, this is a concern that only applies in the absence of local competition. Where such competition does exist, independent programmers will have alternative means of delivering their programming, and competing distributors will have strong incentives to ensure that consumers are able to obtain the programming they value -- regardless of source.⁸

Under these circumstances, competition will ensure that independent programmers are able to reach consumers, and the only effects of applying a vertical limit will be to ban the delivery of particular programs and to reduce competition and diversity. In fact, requiring new entrants to maintain a warehouse of unused capacity because someone may later want to use it would hinder competitive entry, and prevent the development of competition in

⁸ See Horizontal and Vertical Ownership Limits, MM Dkt No. 92-264, Report and Order and FNPRM at 78-79 (rel. Jul. 23, 1993).

the first place. As a result, neither competitor should be subject to a vertical ownership limit.

This is all the more true where one of the competitors is a common carrier video dialtone system.⁹ The fact that one competitor is open to all programmers on the same non-discriminatory terms and conditions provides even further assurance that independent programmers will have a means of delivering their programming.

Second, horizontal ownership limits should not apply to competitive systems.¹⁰ Where local competition is present, there is no risk that a cable operator might become a "gatekeeper" that is able to determine what consumers see.¹¹ And concerns that sellers of video programming would be denied the benefits of

⁹ While the rules adopted by the Commission here impose vertical ownership limits only on cable, and not on telephone companies' video dialtone systems, the Commission has previously suggested that it would consider independently imposing limits on telephone companies in instances where they are permitted to be one of the programmers on their video dialtone networks. See Telephone Company-Cable Television Cross-Ownership Rules, 7 FCC Rcd 5781, 5848 (1992).

¹⁰ The provision of the 1992 Act authorizing the Commission to adopt horizontal ownership limits has been struck down as unconstitutional. Daniels Cablevision, Inc. v. United States, No. 92-2292, Mem. Op. at 21 (D.D.C. Sept. 16, 1993). Nonetheless, the Commission's rules implementing this provision are being addressed here in the event the decision is overturned or modified on appeal.

¹¹ Senate Report at 32.

competition in a market dominated by one buyer simply do not apply.¹²

In particular, concerns that the number of homes passed by a single entity in competitive markets might contribute to its ability to exercise control over programmers at the national level are misplaced.¹³ As Congress found, to the extent cable operators are able to exercise market power, it is a function of a lack of competition in their local service areas.¹⁴ Or to put it another way, it is impossible for a cable operator to exercise control over programmers at the national level unless it controls their ability to reach subscribers in a large percentage of local markets. But that control is lacking in local markets where competition is present.

Applying a horizontal limit to competitive systems would actually have the opposite of Congress's intended effect. Under these circumstances, the only effect of applying the ban would be to preclude new entry by the very companies that are most capable of succeeding as new entrants against the incumbent providers. As a result, it would directly suppress the introduction of competition.

¹² Id. at 33.

¹³ Order, ¶ 29.

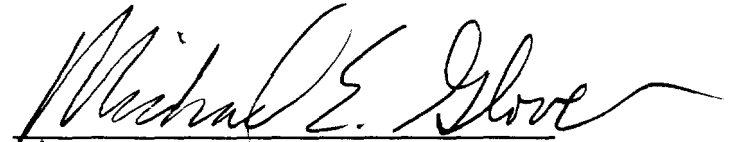
¹⁴ See supra note 3.

Consequently, the Commission should reconsider its rules establishing horizontal and vertical ownership limits for cable, and exclude competitive systems from those limits. As Congress has recognized, and the courts have held, limits on video speech must -- at a minimum -- be narrowly tailored. Limits that affirmatively disserve the Congressional purpose, and that gratuitously ban an identifiable and segregable category of speech, violate the First Amendment.¹⁵

¹⁵ See Ward v. Rock Against Racism, Inc., 491 U.S. 781, 799 (1989) (a restriction on speech may not "burden substantially more speech than is necessary to further the government's legitimate interests").

Respectfully submitted,

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A handwritten signature in cursive script, reading "Michael E. Glover". The signature is written in dark ink and is positioned above a horizontal line.

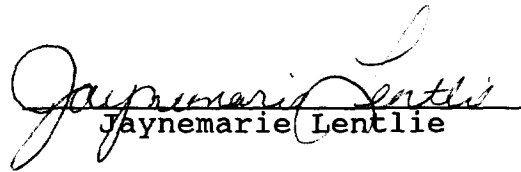
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Petition of Bell Atlantic for Limited Reconsideration" were served this 15th day of December, 1993, by first class mail, postage prepaid, on the parties on the attached list.


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